

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2077

To Be Argued by
ROBERT I. GANNON

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WILLIAM E. WRIGHT,

Petitioner-Appellee,

--vs--

HAROLD J. SMITH, Superintendent,
etc.,

Respondent-Appellant.

77-2077

BRIEF FOR APPELLEE

ROBERT I. GANNON
Attorney for Appellee
Office and P.O. Address
931 Ellicott Square Bldg.
Buffalo, New York 14203
(716) 847-2520



TABLE OF CONTENTS

	PAGE NUMBER
Question Presented.....	1
Statement of the Case.....	2
ARGUMENT - THE STATE TRIAL JUDGES CHARGE TO THE JURY ON PETITIONER'S ALIBI DEFENSE SHIFTED THE BURDEN OF PROOF TO THE PETITIONER-DEFENDANT IN VIOLATION OF DUE PROCESS OF LAW AND CONSTITUTED PREJUDICIAL ERROR.....	7
Conclusion.....	13

TABLE OF CASES

	PAGE
People v. Johnson, 37 App. Div. 2d 733, 323 N.Y.S. 2d 880 (2d Dept. 1971).....	12
United States v. Barosso, 267 F. 2d 908.....	9
United States v. Booz, 451 F. 2d 719 (3d Cir. 1971), cert. den. 414 U.S. 820 (1973).....	10
United States v. Marcus, 166 F. 2d 497 (3d Cir. 1948).....	11
Higgins v. Wainwright, 424 F 2d 177. (5th Cir.) cert denied 400 U.S. 905 (1970).....	11
Smith v. Smith, 454 F. 2d 572 (5th Cir. 1971).....	13
Mann v. U.S., 319, F. 2d 404, 410 (5th Cir. 1963).....	11
Stump v. Bennett, 398 F. 2d 111 (8th Cir. 1968).....	13
Sullivan v. Scafati, 428 F. 2d 1023 (1st Cir. 1970) cert. den. 400 U.S. 1001 (1970).....	8
People v. McLucas, 15 N.Y. 2d 167 171, 256, N.Y.S. 2d 799, 801 (1965).....	12

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WILLIAM E. WRIGHT,

Petitioner-Appellee,

--vs--

HAROLD J. SMITH, Superintendent,
etc.,

Respondent-Appellant.

BRIEF FOR APPELLEE

Question Presented

Whether the State Trial Judge's charge to the jury on petitioner's alibi defense shifted the Burden of Proof to the Petitioner-defendant in violation of due process of law and constituted prejudicial error.

Statement of the Case

This is an appeal from a judgment of the District Court for the Western District of New York (Curtin, J.) entered June 15, 1977, granting a writ of habeas corpus. The petitioner was ordered released from custody within sixty days unless proceedings were initiated by the Erie County District Attorney to retry him (51a).^{*} Petitioner has been released from custody.

On August 3, 1972, following a jury trial in Erie County Court, petitioner William E. Wright was convicted of robbery in the first and second degrees in violation of New York Penal Law Sections 160.15 and 160.10 respectively. The only evidence introduced to connect the defendant with the crime was the eyewitness identification testimony of the victim. He was sentenced to an indeterminate period of up to 25 years on the first degree robbery charge and up to 15 years on the second degree robbery charge, the terms to run concurrently. The Appellate Division, Fourth Department, reversed the conviction with respect to the sentence imposed, and upon remand to the Erie County Court, petitioner was

* Numbers in parentheses followed by "a" refer to pages of the Appendix as submitted by Appellant and stipulated to by Appellee.

resentenced in September, 1973 to an indeterminate sentence of 0-15 years for the first degree robbery count and 0-7 years for the second degree robbery count, the terms to run concurrently. The New York State Court of Appeals denied leave to appeal (November 5, 1973), whereupon petitioner initiated the instant proceeding.

The District Court sustained the petition on the basis that the trial court's instructions to the jury on petitioner's alibi defense improperly shifted the burden of proof to him (34-44a).

The trial court had charged as follows:

"Now, the defendant in this case, in addition to pleading not guilty, has interposed a defense that is commonly known as an alibi. An alibi is a latin [sic] word meaning elsewhere, and when applied to a trial, or in this trial of a case, a trial such as this, it means that at the time of the alleged crime, said to be committed by defendant, that the defendant claims that he was someplace other than the scene of the crime. In this case, through two alibi witnesses, he maintains that he was in an apartment, not far from the scene, if I recall correctly. She said, Ruth Kowles said she came out of 312 Perry Street, and that just outside, some thirty or forty, or fifty feet from where she exited from 312 Perry Street, that she was robbed. Now, the defendant says, through the two alibi witnesses, that he was in fact not out of the house; that he lives at 344 Perry Street, a short distance from the scene, here, but that his physical condition was such that he couldn't run, and that he was in fact not out of the house. It's claimed by one of the alibi witnesses, that he was reading -- reading to his wife

from 4:30 to 5:00, and by the other alibi witness, I believe that he was reading from 4:30 to 5:30, and that he didn't, during this time, leave the house, and in fact, didn't leave the house at all between quarter after four and a quarter to eleven. Now, an alibi defense, if clearly -- clearly established by unsuspected, believable testimony, is the very best that an innocent man can make. No man can be in more than one place at one time. And, if therefore, the defendant was not at the scene of the alleged crime at the time when it is said to have been committed, he cannot be guilty of the commission of any of the crimes in this indictment. Now, you ascertain whether this alibi defense was interposed in good faith. This is your job here, or whether it was a defense that was concocted and resorted to, in an attempt to clear a guilty man of the charge. You should examine not only the principal facts which the alibi witnesses testified to, but carefully examine all of the differences, discrepancies, or contradictions, if there be any in the testimony of these alibi witnesses. You may consider the distances involved from the scene of the events, or were these witnesses accurate, were they evasive; is there any common or mutual interest among the alibi witnesses, which interest might affect them to the extent of creating or helping to create a false alibi, or is their testimony prompted solely by a desire to assist in the true administration of justice. If, after careful analyzing on behalf of the defendant, the evidence which has been presented here, you find it is false or has been interposed, to ask, what was the motive underlying the interposition of the false defense, was it, or was it not to escape the force of convincing circumstances, pointing to guilt. If you find that any such attempt has been made, you may consider that fact in determining the guilt or the innocence of this defendant. But, if on the other hand, you find that this was, that he was truly in that apartment, that he wasn't out on the street, that he, of course, if you

find that he was in that apartment, and never left that apartment that apartment [sic] that afternoon, around 4:45, then you must find him not guilty.

"Now, this is a sharp issue of fact. It's left for your determination. ... "

Following the instructions, the petitioner's Trial Counsel specifically requested a clarifying instruction on the issue of alibi. In response to that request, the court gave the following instruction:

"Counsel has made a request here that I tell you, if you have a -- if the alibi witnesses have created reasonable doubt in your mind as to whether or not the defendant committed the crimes charged here, you have a duty to acquit. Of course, if you have a doubt as to the guilt of the defendant, you are bound to resolve the doubt in favor of the defendant. I am sure that I told you that." (Trial Transcript at 287-291. 302-303).

Almost immediately before the clarification request the Court, in concluding its instructions on the elements of the crimes of first and second degree robbery, had charged the jury that:

"The duty which you owe society is equal with the duty which you owe to the defendant." (Trial Transcript at 300).

The District Court found that the State Trial Judge failed to state anywhere in his instructions that the burden of persuasion with respect to the issue of alibi rested on the State, not the defendant. The District Court further

found that the State Court failed to instruct the jury that the burden of persuasion meant that the State would be thereby required to disprove the alibi beyond a reasonable doubt. (37a-38a).

The District Court additionally found that use of the words "clearly established . . . unsuspected, believable testimony . . ."[emphasis added] in reference to the defendant's offer of an alibi defense was confusing at best and most likely created the impression that the defendant was somehow obliged to clearly establish his alibi defense. (38a-39a; 41a).

The District Court found that the above errors could not be ruled "harmless" beyond a reasonable doubt and required the granting of relief to the petitioner. (43a-44a).

ARGUMENT

THE STATE TRIAL JUDGE'S
CHARGE TO THE JURY ON
PETITIONER'S ALIBI DEFENSE
SHIFTED THE BURDEN OF PROOF
TO THE PETITIONER-DEFENDANT
IN VIOLATION OF DUE PROCESS
OF LAW AND CONSTITUTED
PREJUDICIAL ERROR.

The New York Penal Law does not list an alibi defense as an "affirmative defense." Accordingly, the burden of proof on the issue of alibi rests exclusively with the people.

"When a 'defense' other than an 'affirmative defense,' defined by statute, is raised at a trial, the people have the burden of disproving such defense beyond a reasonable doubt." N.Y.P.L. Sec. 25.00(1)

Jury instructions must be analyzed in their entirety. A substantial portion of the instructions to the jury concerns itself with the alibi issue. The place of importance which the alibi issue would occupy in the minds of the jury is highlighted by the quantity of effort invested by the trial court in outlining that aspect of the trial.

The alibi issue's central significance for the jury is further evidenced by the nature of the cautionary instructions wherein the trial court admonishes the jury to

carefully scrutinize, analyze and evaluate the quality of credibility of the alibi testimony. There is no contention that these exhortations to carefully evaluate the possibilities of concocted alibi testimony constitute reversible error on their face. Sullivan v. Scofati, 428 F2d 1023, 1st(Cir. 1970), Cert denied 400 U.S. 1001 (1971).

The high visibility of the alibi issue, in the eyes of the jury, is heightened by the defendant's request for a supplemental instruction, and the fact that the supplemental alibi instruction is the last guidance given to the jury before deliberation. It is difficult to conceive of any impression being conveyed to the minds of the jury other than the proposition that: if the defendant had failed to meet the obligations of either clearly establishing his presence elsewhere or of at least creating a reasonable doubt of his presence at the scene of the crime, then he was to be found guilty.

This was clearly the finding that the District Court made after analysis of the instructions and the record shows substantial basis for the finding.

The record shows the following charge given in the trial court's first instructions:

"Now, an alibi defense, if clearly . . . clearly established by unsuspected believable testimony, is the very best that an innocent man can make."
(Trial Transcript at p.288)(Appendix 46a)

The District Court held

"However, I find it hard to believe that the jury would not rely on this standard in the course of evaluating the evidence of the case before it." (38a-39a)

At defendant's request for clarification, the following supplemental instruction was given:

"If the alibi witnesses have created reasonable doubt in your mind as to whether or not the defendant committed the crimes charged here you have a duty to acquit. Of course, that is true, if you have a doubt as to the guilt of the defendant, you are bound to resolve the doubt in favor of the defendant. I am sure I told you that." [emphasis added] (Trial Transcript at 303) (41a)

The District Court found that the above language would imply to the jury that the defendant or his witnesses would have to actively create a reasonable doubt by means of his alibi testimony. (41a)

The allegedly remedial language in the latter part of the supplemental instructions is not curative in light of the opinion in U.S. v. Barosso, 267 F2d 908. The remedial words in the instant case "I am sure I told you that." are indistinguishable from the language disapproved of in Barosso, concerning a similar request for a supplemental alibi instruction. "I thought that was self-evident." 267 F2d 908, 910.

The very real likelihood of the jury's expectation that the instructions required the defendant to meet a standard of actively creating a reasonable doubt was recognized in U.S. v. Booz 451 F2d 719, (3d Cir 1971).

Cert denied 404 U.S. 820 (1973)

"When affirmative proof, best known by the defendant himself, is offered, a likelihood exists that jurors would look to that proof for persuasion of its Truth."
451 F2d 719, 723.

The Booz court set forth the proper standard for instruction on the issue of the quality of the proof to be required of an alibi defense:

[Such proof] . . . "need only raise a reasonable doubt in the juror's minds as to whether the defendant was present at the scene." U.S. v. Booz 451 F2d 719, 724.

The Appellant-Respondent has consistently urged that the instructions be considered in their entirety. It is interesting to note that nowhere in the instructions does the Court expressly explain that presence at the scene is a necessary and distinct element of the crime to be proved by the People, or that disbelief of the alibi testimony does not establish the defendant's presence at the scene. Few lawyers, and certainly not lay jurors, consciously distinguish presence as a distinct and necessary element to be proved by the People.

"Where there are probabilities of confusion to lawyers, as well as laymen, we cannot ignore the prejudice." Mann v. U.S., 319, F. 2d 404,410 (5th Cir. 1963)

Shortly before giving the supplemental instruction on alibi the court charged the jury as follows:

"The duty which you owe society is equal with the duty which you owe to the defendant." (Trial Transcript at 300).

This instruction, combined with the above described improper alibi instructions affords a very substantial, if not conclusive, basis for the findings of Judge Curtin that the burden of proof was unconstitutionally shifted to the defendant and deprived him of his right to a fair trial.

The District Court acted properly in setting aside the conviction. The ultimate effect of the improper instructions was to deny the appellee-petitioner a fundamental due process right to have the state carry the burden of establishing his guilt. Upon the shifting of the burden of proof on the issue of the defendant's presence at the scene of the crime the trial became fundamentally unfair. Higgins v. Wainwright 424 F2d 177. (5th Cir.) cert denied 400 U.S. 905 (1970) rehearing denied 400 U.S. 1002 (1971).

When the defendant requested a clarification of the alibi charge it was the court's duty to compose an adequate instruction. U.S. v. Marcus 166 F. 2d 497, 504 (3d Cir. 1948).

The fact that the Court made a good faith effort to issue a supplemental instruction does not satisfy the defendant's right to be free from the burden of establishing his innocence.

"This supplemental instruction still did not make clear that, on the issue of alibi, the government had to convince the jury beyond a reasonable doubt that the alibi was not true. The inadequacy of both charges was not cured by the general allusion, intersplined throughout the entire instruction, to the fact that the government bore the burden of persuasion on all issues raised at trial." U.S. v. Booz 451 F. 2d 719, 723 cert den. 414 U.S. 820 See also U.S. v. Barasso 267 F. 2d 908 at 910.

The same interpretation and result has been required under the law of New York.

[The defendant]" . . . has no burden of producing" unsuspected believable testimony" of an alibi, . . ." People v. Johnson 37 App. Div. 2d 733, 323 N.Y.S. 2d 880 (2d Dept. 1971)

" . . . any statement of a Trial Judge which tends to deprive a defendant of the full protection of the statute is reversible error and that the force of the constitutional protection is not to be weakened by qualifying words." People v. McLucas 15 N.Y. 2d 167 171, 256, N.Y.S. 2d 799, 801 (1965)

Both the Fifth and Eighth Circuits have recognized that instructions which could cause a jury misunderstanding of the burden of proof will substantiate a claim of prejudicial error, cognizable in a Habeas Corpus proceeding.

" . . . if inconsistent meanings are conveyed by the instruction, whereby a jury could derive an erroneous understanding of the burden, it is difficult to reason that a reasonable doubt does not exist as to the prejudice involved." Stump v. Bennett, 398 F. 2d 111, 122 (8th Cir. 1968), cert. den. 398 U S 1001 (1968).

The Fifth Circuit held in Smith v . Smith, 454 F. 2d 572, (5th Cir. 1971), cert denied 409 U.S. 885 (1972), that a

" . . . shift in the burden of proof of an essential element of the crime does rise to constitutional proportions and, renders the trial fundamentally unfair." 454 F. 2d 572, 579.

CONCLUSION

THE DISTRICT COURT ACTED PROPERLY IN ISSUING THE WRIT ON THE BASIS OF APPELLEE-PETITIONER'S HAVING BEEN DENIED DUE PROCESS OF LAW. THE APPEAL SHOULD BE DISMISSED.

Respectfully submitted,

ROBERT I. GANNON
Attorney for Appellee

Dated: Buffalo, New York
November 5, 1977

